A

PP

v.

KOK WAH KUAN

B

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
ABDUL HAMID MOHAMAD PCA
ALAUDDIN MOHD SHERIFF CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
C ZAKI TUN AZMI FCJ
[CRIMINAL APPEAL NO: 05-46-2007 (W)]
23 OCTOBER 2007

CONSTITUTIONAL LAW: *Federal Constitution - Separation of*
D *powers, doctrine of - Whether integral part of Constitution - Section 97(2) of Child Act 2001 - Child convict to be held at pleasure of Yang di-Pertuan Agong - Whether consigning judicial power to the Executive - Whether contravening doctrine of separation of powers - Whether unconstitutional - Federal Constitution, arts. 39, 40, 121(1) - Child Act*
E *2001, s. 97(2) - Penal Code, s. 302*

CONSTITUTIONAL LAW: *Federal Constitution - Article 121(1), amendment to - Effect and scope - Whether article sole repository of judicial role of courts - Jurisdiction and powers of courts - Whether only*
F *as conferred by federal law - Whether courts servile agents of federal law - Federal Constitution, arts. 39, 40, 121(1)*

CRIMINAL PROCEDURE: *Sentence - Murder - Child convict - Alternative sentence under Child Act 2001 - Child ordered to be held in custody during pleasure of Yang di-Pertuan Agong - Whether order lawful*
G *- Child Act 2001, s. 97(2) - Penal Code, s. 302*

WORDS & PHRASES: *"The High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under federal law" - Federal Constitution, art. 121(1) - Meaning and import -*
H *Whether courts reduced to servile agents of Acts of Parliament*

This was an appeal by the Public Prosecutor against the decision of the Court of Appeal ruling that notwithstanding that the learned High Court judge was correct in convicting the 12-year
I old respondent for murder under s. 302 Penal Code, he was nonetheless wrong in ordering the child convict to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to s. 97(2) of the Child Act 2001 ('the Act').

It was the view of the Court of Appeal, in so faulting the learned judge, that s. 97(2) of the Act, upon a proper reading of the Federal Constitution, including arts. 39, 40 and 121(1) therein, was unconstitutional – for having consigned the Court's judicial power to determine the measure of sentence to be served by the respondent to the Executive and contravened the doctrine of separation of powers housed in the Constitution. The Public Prosecutor retorted otherwise, whereof the learned justices of the apex court, on account of the constitutional deliberations undertaken by the Court of Appeal, deemed it wise and proper to re-visit the relevant constitutional provisions, before pronouncing their opinion thereon and answering the question of whether the learned High Court judge was wrong in making the order aforesaid, or conversely whether the Court of Appeal was justified in releasing the respondent forthwith from custody.

Held (allowing appeal and restoring order of High Court)
Per Abdul Hamid Mohamad PCA (delivering the judgment of the court):

(1) Following the amendment to art. 121(1) of the Constitution by Act A704, there was no longer a specific provision declaring that the "judicial power of the Federation", as the term was understood prior to the amendment, is vested in the two High Courts. This prompted us to look at the federal law if we want to know about the jurisdiction and powers of the two High Courts. In short, to what extent such "judicial powers" are vested in the two courts would depend on what federal law provides, not on the interpretation of the term "judicial power" as prior to the amendment. This is the difference and the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. (para 11)

(2) In the instant appeal, even the Court of Appeal's judgment does not, indeed cannot, show which provision of the Constitution s. 97 is inconsistent with. Instead, the court held that that section violated the doctrine of the separation of powers, which, in its view, was an integral part of the Constitution. (para 13)

(3) The doctrine of separation of powers is a political doctrine under which the legislative, executive and judicial branches of government are kept distinct, to prevent abuse of power. However, Malaysia has its own model. Whilst our

A Constitution does have the features of the separation of powers, it also contains features which do not strictly comply with the doctrine. To what extent the doctrine applies, therefore, depends on the provisions of the Constitution. (paras 14 & 17)

B

(3a) In determining the constitutionality or otherwise of a statute under our Constitution, it is the provision of the Constitution that matters, not a political theory expounded by some thinkers. The doctrine of separation of powers is C not a provision of the Malaysian Constitution. Thus, a provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it D may be inconsistent with the doctrine. (paras 17 & 18)

(4) Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by the law. It E further provides that, instead, the child shall be ordered to be detained in a prison during the pleasure of the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri, depending on where the offence was committed. That is the sentencing power given by federal law to the court as F provided by the Constitution. (para 22)

Per Richard Malanjum CJ (Sabah & Sarawak) (concurring):

(1) On a plain reading of subsection (2) of s. 97, it is clear that G it empowers the court, after convicting a person who was a child at the time of the commission of an offence punishable with death, to make an alternative order instead of imposing a sentence of death. The alternative power to make such an order is no less than the power of the court to impose a H sentence or punishment on a child convict *albeit* in a different form, namely to the care of the Yang di Pertuan Agong or to the Ruler or to the Yang di-Pertua Negeri depending on where the offence was committed. There is nothing unconstitutional about this scheme. (paras 33 & 34)

I

(2) I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution, courts in Malaysia can only function in accordance with what have been assigned to them by the federal law. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and function to ensure that there is "check and balance" in the system including to dispense justice according to law. (para 37)

(3) The amendment which states that "the High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under federal law" should by no means be read to mean that the doctrines of separation of powers and independence of the judiciary are now no more the basic features of our Federal Constitution – or that the courts have now become servile agents of the federal Acts of Parliament and to perform mechanically any command or bidding of a federal law. (para 38)

(4) The courts, especially the superior courts, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot, be the whole and sole repository of the judicial role in this country. It cannot be so considering – that the amendment seeks to limit the jurisdiction and powers of the High Courts and the inferior courts to whatever "may be conferred by or under federal law", that the jurisdiction and powers of the courts cannot be confined to federal law as their role is to be servants of the law as a whole, that since the Federal Constitution is superior to federal law the amendment cannot be said to have taken away the powers of the courts to examine issues of constitutionality, that the amendment should not be read to destroy the courts' common law powers, that the amendment cannot prevent the courts from interpreting the law creatively, that in interpreting constitutional provisions a judge cannot afford to be too literal, and that the role of a judge is constitutive and creative and extends to direct or indirect law making. (para 39)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan oleh Pendakwa Raya terhadap keputusan Mahkamah Rayuan yang memutuskan bahawa walaupun yang arif hakim betul dalam mensabitkan responden, yang berumur 12
B tahun, atas kesalahan bunuh di bawah s. 302 Kanun Keseksaan, beliau khilaf apabila memerintahkan pesalah kanak-kanak tersebut ditahan menurut perkenan Yang di-Pertuan Agong di bawah s. 97(2) Akta Kanak-Kanak 2001 ('Akta').

C Adalah menjadi pandangan Mahkamah Rayuan, dalam menyalahkan yang arif hakim, bahawa s. 97(2) Akta adalah tidak berperlembagaan atas pembacaan wajar Perlembagaan Persekutuan, termasuk fasal-fasal 39, 40 dan 121(1)nya – kerana telah menyerahkan kuasa kehakiman Mahkamah untuk menentukan had hukuman yang perlu
D dijalani oleh responden kepada pihak Eksekutif, sekaligus menyanggahi doktrin perasingan kuasa yang termaktub di dalam Perlembagaan. Pendakwa Raya berhujah sebaliknya, dan berikutnya, yang arif hakim-hakim mahkamah tertinggi, dengan mengambilkira perbincangan-perbincangan perlembagaan oleh
E Mahkamah Rayuan, merasakan patut dan wajar untuk meneliti semula peruntukan-peruntukan perlembagaan berkenaan, sebelum mengambil pendirian mereka dan seterusnya menjawab persoalan sama ada yang arif hakim Mahkamah Tinggi khilaf dalam membuat perintah di atas, atau sebaliknya sama ada Mahkamah Rayuan
F betul apabila membebaskan responden dengan serta merta dari tahanan.

Diputuskan (membenarkan rayuan dan mengekalkan perintah Mahkamah Tinggi)

Oleh Abdul Hamid Mohamad PMR (menyampaikan
G **penghakiman mahkamah):**

(1) Berikutan pindaan kepada fasal 121(1) Perlembagaan oleh Akta A704, tidak ada lagi peruntukan spesifik yang mengisytiharkan bahawa "kuasa kehakiman Persekutuan",
H sepertimana ungkapan itu difahami sebelum pindaan, adalah terletakhak kepada kedua-dua Mahkamah Tinggi. Ini memaksa kita untuk melihat kepada undang-undang persekutuan jika kita ingin tahu mengenai kuasa-kuasa dan bidangkuasa kedua-dua Mahkamah Tinggi. Apapun, setakat
I manakah "kuasa kehakiman" sedemikian terletakhak kepada kedua-dua mahkamah bergantung kepada apa yang diperuntukkan oleh undang-undang persekutuan, bukannya

kepada pentafsiran terma "kuasa kehakiman" seperti yang berlaku sebelum pindaan. Inilah perbezaan dan kesan pindaan tersebut. Oleh itu, adalah tidak masuk akal untuk mengatakan bahawa pindaan tidak memberi apa-apa kesan.

(2) Dalam rayuan semasa, penghakiman Mahkamah Rayuan sendiri tidak, malah tidak mampu, menunjukkan dengan bahagian peruntukan Perlembagaan yang manakah s. 97 didapati tidak konsisten. Mahkamah tersebut sebaliknya memutuskan bahawa seksyen tersebut telah melanggari doktrin perasingan kuasa yang, menurut pandangannya, merupakan sebahagian dari Perlembagaan.

(3) Perasingan kuasa adalah satu doktrin politik di mana cabang perundangan, eksekutif dan kehakiman kerajaan diasingkan, bagi mengelakkan salahguna kuasa. Malaysia bagaimanapun mempunyai modelnya yang tersendiri. Sementara Perlembagaan kita mengandungi beberapa ciri perasingan kuasa, ia juga mempunyai ciri-ciri yang tidak menepati secara ketat ciri-ciri doktrin tersebut. Maka itu, setakat manakah doktrin ini terpakai akan bergantung kepada peruntukan-peruntukan Perlembagaan.

(3a) Yang penting dalam menentukan keperlembagaan atau tidaknya sesuatu statut di bawah Perlembagaan adalah peruntukan Perlembagaan sendiri, bukannya teori politik yang dilaungkan oleh beberapa pemikir-pemikir. Doktrin perasingan kuasa bukan merupakan sebahagian dari Perlembagaan Malaysia. Oleh itu, satu peruntukan Perlembagaan tidak boleh dibatalkan atas alasan bahawa ia melanggar doktrin. Begitu juga, mana-mana peruntukan undang-undang tidak boleh dibatalkan atas alasan tidak perlembagaan jika ia konsisten dengan Perlembagaan, walaupun ia mungkin tidak konsisten dengan doktrin.

(4) Undang-undang persekutuan memperuntukkan bahawa hukuman mati tidak boleh diisytiharkan terhadap seseorang yang masih kanak-kanak semasa kesalahan dilakukan. Itu adalah had kuasa kehakiman mahkamah yang ditetapkan oleh undang-undang. Ia juga memperuntukkan bahawa kanak-kanak tersebut sebaliknya hendaklah di tahan di penjara selagi diperkenan Yang di-Pertuan Agong atau Raja Pemerintah atau Yang di-Pertua Negeri, bergantung kepada di mana

kesalahan itu dilakukan. Inilah kuasa menghukum yang diberikan oleh undang-undang persekutuan kepada mahkamah seperti yang diperuntukkan oleh Perlembagaan.

Oleh Richard Malanjum HB (Sabah & Sarawak) (menyetujui):

(1) Atas pembacaan biasa subseksyen (2) s. 97, jelas bahawa ia memberi kuasa kepada mahkamah, setelah mensabitkan seseorang yang merupakan seorang kanak-kanak semasa kesalahan dilakukan atas satu kesalahan yang boleh dihukum mati, untuk membuat perintah alternatif dan tidak mengenakan hukuman mati. Kuasa alternatif untuk membuat perintah ini samalah juga dengan kuasa mahkamah untuk menjatuhkan hukuman ke atas pesalah kanak-kanak, walaupun dalam bentuk yang berbeza, iaitu dengan meletakkannya di bawah jagaan Yang di-Pertuan Agong atau Raja Pemerintah atau Yang di-Pertua Negeri, berdasarkan tempat di mana kesalahan tersebut dilakukan. Tiada apa pun yang tidak berperlembagaan mengenai skim ini.

(2) Saya tidak dapat bersetuju dengan pandangan bahawa dengan pindaan yang dibuat kepada fasal 121(1) Perlembagaan Persekutuan, maka mahkamah-mahkamah di Malaysia hanya boleh berfungsi menurut apa yang diberikan kepada mereka oleh undang-undang persekutuan. Menerima pandangan tersebut adalah bertentangan dengan sistem kerajaan demokratik di mana mahkamah merupakan cabang yang ketiga kepada kerajaan dan berfungsi untuk mempastikan wujud "neraca dan keseimbangan" pada sistem termasuk untuk melaksanakan keadilan menurut undang-undang.

(3) Pindaan yang menyatakan bahawa "Mahkamah-mahkamah Tinggi dan mahkamah-mahkamah rendah hendaklah mempunyai bidangkuasa dan kuasa-kuasa seperti yang diberikan oleh undang-undang persekutuan" tidak bermakna bahawa doktrin-doktrin perasingan kuasa dan kebebasan kehakiman tidak lagi menjadi ciri asas Perlembagaan Persekutuan kita – ataupun bahawa mahkamah-mahkamah kini menjadi agen yang tunduk secara mekanikal kepada setiap perintah atau kehendak undang-undang persekutuan.

(4) Mahkamah-mahkamah, terutama mahkamah-mahkamah peringkat tinggi, adalah merupakan tunggak Perlembagaan Persekutuan yang berdiri secara terasing dan bebas dan sekali-kali tidak menjadi agen undang-undang persekutuan. Dalam menjalankan tugas mereka, mereka melakukan berbagai fungsi dan mentafsir serta melaksanakan berbagai undang-undang. Fasal 121(1) bukanlah, dan tidak boleh menjadi sumber tunggal peranan badan kehakiman di negara ini. Ia tidak boleh menjadi begitu mengambilkira – bahawa pindaan bertujuan untuk menghadkan bidangkuasa dan kuasa-kuasa Mahkamah-mahkamah Tinggi dan mahkamah-mahkamah rendah kepada "apa yang diberikan oleh undang-undang persekutuan", bahawa bidangkuasa dan kuasa-kuasa mahkamah tidak boleh dihadkan kepada undang-undang undang-undang persekutuan memandangkan peranan mereka adalah untuk melaksanakan undang-undang secara keseluruhannya, bahawa oleh kerana Perlembagaan Persekutuan lebih tinggi kedudukannya dari undang-undang persekutuan maka pindaan tidak boleh dianggap sebagai telah melupuskan kuasa mahkamah untuk meneliti isu-isu perlembagaan, bahawa pindaan tidak boleh dibaca sebagai telah memusnahkan kuasa undang-undang common mahkamah, bahawa pindaan tidak boleh menghalang mahkamah dari mentafsir undang-undang secara kreatif, bahawa dalam mentafsir peruntukan perlembagaan seorang hakim tidak boleh bertindak terlalu literal, dan bahawa peranan seorang hakim adalah bersifat konstitutif dan kreatif dan menjangkaui peranan membuat undang-undang secara langsung atau tidak langsung.

Case(s) referred to:

Chiu Wing Wa & Ors v. Ong Beng Cheng [1994] 1 CLJ 313 SC ***(refd)***

Dato' Yap Peng v. PP [1987] 2 MLJ 31 ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

Faridah Begum v. Sultan Ahmad Shah [1996] 2 CLJ 159 ***(refd)***

Hajjah Halimatussaadiah v. Public Services Commission [1992] 1 CLJ 413; [1992] 2 CLJ (Rep) 467 HC ***(refd)***

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

Mamat Daud & Ors v. Government of Malaysia & Anor [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197 SC ***(refd)***

Ngan Tuck Seng v. Ngan Yin Groundnut Factory Sdn Bhd [1999] 3 CLJ 26 HC ***(refd)***

A *Ooi Ah Phua v. Officer-In-Charge Criminal Investigation, Kedah/Perlis [1975] 1 LNS 117* ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
B *R v. Lord Chancellor, ex p Witham [1998] QB 575* ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Standard Chartered Bank and Others v. Directorate of Enforcement and Others [2005] AIR SC 2622 ***(refd)***
C *Teoh Eng Huat v. Kadhi Pasir Mas [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277 SC* ***(refd)***

Legislation referred to:
Child Act 2001, s. 97(2)
Criminal Procedure Code, ss. 183, 418A
D Federal Constitution, arts. 4(1), 5(1), (3), 11, 32(1), 39, 40, 41, 44, 45(1), 121(1)(b), 121(1B), (2), 128(1), (2), 160(2), 162(6)
Penal Code, s. 302
Prison Act 1995, ss. 44, 50, 67

E *For the appellant - Tan Sri Abdul Gani Patail; Public Prosecutor/Att. General, Malaysia (Yacub Sam DPP with him)*
For the respondent - Karpal Singh (Ram Karpal Singh with him); M/s Karpal Singh & Co

Reported by WA Sharif

F

JUDGMENT

Abdul Hamid Mohamad PCA:

G **[1]** The respondent who was 12 years and 9 months old at the time of the commission of the offence was charged in the High Court for the offence of murder punishable under s. 302 of the Penal Code. He was convicted and ordered to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to s. 97(2) of the Child Act 2001 (Act 611) ("the Child Act"). He appealed to the Court of Appeal. The Court of Appeal upheld the conviction but set aside the sentence imposed on him and released him from custody on the sole ground that s. 97(2) of the Child Act was unconstitutional. The Public Prosecutor appealed to this court.
H

I

[2] On what ground did the Court of Appeal hold s. 97(2) of the Child Act to be unconstitutional? A

[3] From the judgment of the Court of Appeal, it can be seen that that court had arrived at that conclusion on the following premises: B

(i) The doctrine of separation of powers is an integral part of the Constitution;

(ii) Judicial power of the Federation vests in the courts; C

(iii) By s. 97(2) of the Child Act, Parliament had consigned the power to determine the measure of the sentence that was to be served to the Yang di-Pertuan Agong in the case of an offence committed in the Federal Territories, or to the Ruler or the Yang di-Pertua Negeri, if the offence is committed in D the State.

(iv) By virtue of art. 39 of the Constitution, the executive authority of the Federation vests in the Yang di-Pertuan Agong who, in accordance with art. 40 of the Constitution, must act in accordance with the advice given by the Cabinet E or particular minister of the Cabinet.

(v) Therefore, s. 97(2) of the Child Act contravenes the doctrine of separation of powers housed in the Constitution by consigning to the Executive the judicial power to determine F the measure of the sentence to be served by the appellant.

[4] Before going any further I will first reproduce the relevant provisions of the Constitution and the Child Act. Article 121 of the Constitution provides: G

> 121. (1) **There shall be** two High Courts of co-ordinate jurisdiction and status, namely:
>
> (a) one in the States of Malaya … and;
>
> (b) one in the States of Sabah and Sarawak … and the High Courts … **shall have such jurisdiction and powers as may be conferred by or under federal law.** (emphasis added) H

[5] Article 4(1) of the Constitution provides: I

A 4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[6] Section 97 of the Child Act provides:

B 97.(1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.

(2) *In lieu* of a sentence of death, the Court shall order a person convicted of an offence to be detained in a prison during C the pleasure of:

(a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or

D (b) the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.

(3) If the Court makes an order under subsection (2), that person shall, notwithstanding anything in this Act:

E (a) be liable to be detained in such prison and under such conditions as the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may direct; and

(b) while so detained, be deemed to be in lawful custody.

F (4) If a person is ordered to be detained at a prison under subsection (2), the Board of Visiting Justices for that prison:

(a) shall review that person's case at least once a year; and

G (b) may recommend to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri on the early release of further detention of that person,

and the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may thereupon order him to be released or further detained, as the case may be.
H

[7] The Court of Appeal posed two questions for it to answer. They are, first, whether the doctrine of separation of powers is an integral part of the Constitution and, secondly, whether s. 97 of the Child Act "in pith and substance violates the doctrine." The I Court, answered the two questions in the affirmative. On the first

question, the court held that the amendment to art. 121 of the Constitution by Act A 704 did not have the effect of divesting the courts of the judicial power of the Federation. The court gave two reasons:

> First, the amending Act did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the Executive or Parliament or both those arms of government.
>
> Second, the marginal note to art. 121 was not amended. This clearly expresses the intention of Parliament not to divest ordinary courts of judicial power of the Federation and to transfer it to or share it with either the Executive or the Legislature.

[8] Let us take a close look at the provision of art. 121 of the Constitution before and after the amendment.

[9] Prior to the amendment, art. 121(1) of the Constitution reads: "… the judicial power of the Federation shall be vested in the two High Courts … and the High Courts … shall have such jurisdiction and powers as may be conferred by or under federal law.

[10] There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked "Was the judicial power of the Federation vested in the two High Courts?" The answer has to be "yes" because that was what the Constitution provided. Whatever the words "judicial power" mean is a matter of interpretation. Having made the declaration in general terms, the provision went of to say "and the High Courts … shall have jurisdiction and powers as may be conferred by or under federal law." In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law.

[11] After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that "judicial power of the Federation" as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers "judicial powers", we are perfectly

entitled to. But, to what extent such "judicial powers" are vested in the two High Courts depend on what federal law provides, not on the interpretation of the term "judicial power" as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?

[12] In *Public Prosecutor v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284, s. 418A of the Criminal Procedure Code came into question as it was argued that it infringed art. 121(1) and 5(1) of the Federal Constitution. Zakaria Yatim J (as he then was) held that s. 418A of the Criminal Procedure was unconstitutional as it was inconsistent with art. 121(1) of the Constitution. Appeal to the Supreme Court was dismissed by a majority of 3:2. That case was decided, not on the ground that it was inconsistent with the doctrine of separation of powers. It was decided on the ground that it was inconsistent with the term "judicial power" of the court then provided by art. 121(1) of the Constitution. In other words s. 418A was inconsistent with the specific provision of the Constitution that provides "… the judicial power of the Federation shall be vested in two High Courts …" The inconsistency then attracts art. 4(1) of the Constitution which declares such a law, to the extent of the inconsistency, be void.

[13] What about the instant appeal? In the instant appeal, even the Court of Appeal's judgment does not, indeed cannot, show which provision of the Constitution s. 97 is inconsistent with. Instead the court held that that section violated the doctrine of the separation of powers, which, in its view was an integral part of the Constitution.

[14] What is this doctrine of separation of powers? Separation of powers is a term coined by French political enlightenment thinker Baron de Montesquieu. It is a political doctrine under which the legislative, executive and judicial branches of government are kept distinct, to prevent abuse of power. The principle traces its origins as far back as Aristotle's time. During the Age of Enlightenment, several philosophers, such as John Locke and James Harrington, advocated the principle in their writings, whereas others such as Thomas Hobbes strongly opposed it. Montesquieu was one of the foremost supporters of the doctrine. His writings considerably influenced the opinions of the framers of Constitution of the

United States. There, it is widely known as "checks and balances". Under the Westminster System this separation does not fully exist. The three branches exist but Ministers, for example, are both executives and legislators. Until recently, the Lord Chancellor was a member of all the three branches – see generally ECS Wade and A W Bradley: *Constitutional and Administrative Law* 10th edn; Wikipedia (Encyclopedia).

[15] In P. Ramanatha Aiyar's *Advance Law Lexicon*, vol. 4, we find the following passage:

> It is extraordinarily difficult to define precisely each particular power. – George Whitecross Paton, *A Textbook of Jurisprudence* 330 (G.W. Paton & David P. Derham eds., 4th ed. 1972).
>
> A political system that separates executive, legislative, and judicial powers of government into separate branches. Some systems combine two, or even all three, powers into single institutions. In the United States, many administrative agencies actually exercise at least first level judicial powers, and many administrative agencies also exercise what amount to legislative powers in promulgating detailed legal regulations: In other systems, the absence of a separation of powers, particularly between the executive and the legislative, is more explicit ... as in the Westminster-style parliamentary system.

[16] Malaysia, like the United States has a written Constitution that spells out the functions of the three branches. At the same time it follows the Westminster model and has its own peculiarities. The Yang di-Pertuan Agong is the Supreme Head of the Federation (art. 32(1)). The executive authority of the Federation is vested in the Yang di-Pertuan Agong (art. 39). He is the Supreme Commander of the armed forces of the Federation (art. 41). Parliament consists of the Yang di-Pertuan Agong, the Dewan Negara and Dewan Rakyat (art. 44). While members of the Dewan Rakyat are directly elected, members of the Dewan Negara may be elected by the Legislative Assembly of the States or appointed by the Yang di-Pertuan Agong (art. 45(1) and Seventh Schedule). Judges, including the Chief Justice are appointed by the Yang di-Pertuan Agong. Even the principal registry of the High Court of Sabah and Sarawak is determined by the Yang di-Pertuan Agong (art. 121(1)(b)). On top of all that, the Yang di-Pertuan Agong, unlike the British Monarch, is elected by the Conference of Rulers for a fixed period of five years. And so on.

[17] In other words we have our own model. Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process. That does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore void.

[18] So, in determining the constitutionality or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90 FC said: "The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it."

[19] His Lordship further said:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording "can never be overridden by the extraneous principles of other Constitutions" – see *Adegbenro v. Atkintola & Anor* [1963] 3 All ER 544, 551. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

[20] I agree entirely with those observations.

[21] Now that the pre-amendment words are no longer there, they simply cannot be used to determine the validity of a provision of a statute. The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High

Courts, they "shall have such jurisdiction and powers as may be conferred by or under federal law." So, we will have to look at the federal law to know the jurisdiction and powers of the courts. (In the case of the Federal Court and the Court of Appeal, part of their jurisdiction is specifically provided in the Constitution itself – see art. 121(1B) and (2) respectively).

[22] So, even if we say that judicial power still vests in the courts, in law, the nature and extent of the power depends on what the Constitution provides, not what some political thinkers think "judicial power" is. Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by law. It further provides that, instead, the child shall be ordered to be detained in a prison during the pleasure of the Yang di-Pertuan Agong or the Ruler or the Yang Di-Pertua Negeri, depending on where the offence was committed. That is the sentencing power given by federal law to the court as provided by the Constitution. Similarly, in some cases, federal law provides for death sentence, in others, imprisonment and/or fine, some are mandatory and some are discretionary. The legislature provides the sentences, the court imposes it where appropriate.

[23] Going one step further, even where the court imposes a sentence of imprisonment for a fixed term of more than a month, a prisoner is entitled to be granted a remission of his sentence. The Director General of Prisons may cancel any part of the remission if the prisoner commits an offence under s. 50 of the Act. He may restore to the prisoner all or any part of the remission which the prisoner has forfeited during his sentence – s. 44 of the Prison Act 1995 (Act 537) ("the Prison "Act").

[24] Section 67 of the Prison Act empowers the Minister to publish in the Gazette such regulations, *inter alia*, providing for the remission of sentences to be allowed to a prisoner. Hence Prisons Regulations 2000 (P.U.(A) 325/2000) is made.

[25] We see here that the Prison Act empowers the Director General of Prisons to cancel and restore the remission which may be argued to amount to meddling with the fixed term of imprisonment passed by the court. Following the argument of the Court of Appeal, this should be unconstitutional too.

[26] Let us take another example. It is common for a statute to make provision for a Minister in charge of an Act of Parliament to make rules or regulations. The Minister is an executive. Rules and Regulations and by-laws, having the effects of law, is within the realm of the legislature to make, not the executive. Yet, I am unable to find any provision in the Constitution giving power to the legislature to make law to give the power to make such by-laws to the executive. So, are the provisions in the statutes giving Ministers power to make by-laws unconstitutional too on the ground that they contravene the doctrine of separation of powers? All these show the absurdity of applying the doctrine as a provision of the Constitution.

[27] All these examples show that the doctrine is not definite and absolute. The extent of its application varies from country to country, depending on how much it is accepted and in what manner it is provided for by the Constitution of a country. Similarly, judgments from other jurisdictions, while they are useful comparisons, should not be treated as if they are binding on our courts. As such, I do not think it is necessary to discuss all those cases from other jurisdictions referred to us.

[28] On these grounds I would allow the appeal, set aside the order of the Court of Appeal and reinstate the order of the High Court.

[29] Ahmad Fairuz Sheikh Halim CJ, Alauddin Mohd. Sheriff CJ (M) and Zaki Azmi FCJ have read this judgment and agreed with it.

Richard Malanjum CJ (Sabah & Sarawak):

[30] This is an appeal by the Public Prosecutor against the decision of the Court of Appeal which upheld the conviction of the respondent but set aside the sentence imposed and released him from custody on the ground that s. 97(2) of the Child Act 2001 (Act 611) was unconstitutional.

[31] I need not summarize the reasons given by the Court of Appeal since it has already been admirably done in the judgment of the learned President of the Court of Appeal.

[32] Section 97 of the Child Act reads:

(1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.

(2) *In lieu* of a sentence of death, the Court shall order a person convicted of an offence to be detained in a prison during the pleasure of:

(a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or

(b) the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.

(3) If the Court makes an order under subsection (2), that person shall, notwithstanding anything in this Act:

(a) be liable to be detained in such prison and under such conditions as the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may direct; and

(b) while so detained, be deemed to be in lawful custody.

(4) If a person is ordered to be detained at a prison under subsection (2), the Board of Visiting Justices for that prison:

(a) shall review that person's case at least once a year; and

(b) may recommend to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri on the early release or further detention of that person, and the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may thereupon order him to be released or further detained, as the case may be.

[33] On plain reading of subsection (2) of s. 97 it is clear that it empowers the court, after convicting a person who was a child at the time of commission of an offence punishable with death, to make an alternative order instead of imposing a sentence of death. In my view the alternative power to make such an order as provided for by the subsection is no less than the power of the court to impose a sentence or punishment on a child convict *albeit* in a different form, namely, to the care of the Yang di-Pertuan Agong or to the Ruler or to the Yang di-Pertua Negeri depending on where the offence was committed.

[34] Hence, with respect I do not think there is anything unconstitutional in the scheme since it is still the court that makes the order consequential to its conviction order. In my view when the court makes the order it is carrying out the process of sentencing which is generally understood to mean a process whereby punishment in accordance with established judicial principles is meted out by the court after a conviction order has been made following a full trial or a guilty plea. (See: *Public Prosecutor v. Jafa bin Daud* [1981] 1 LNS 28; *Standard Chartered Bank and Others v. Directorate of Enforcement and Others* [2005] AIR SC 2622). Incidentally s. 183 of the Criminal Procedure Code provides: 'If the accused is convicted, the Court shall pass sentence according to law'.

[35] It might have been a different conclusion if the subsection leaves it entirely to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri as the case may be to deal with a child convict after being convicted by the court.

[36] For the above reason I do not think it is thus necessary for me to deal with those constitutional points highlighted by the Court of Appeal in coming to its decision.

[37] At any rate I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.

[38] The amendment which states that "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law" should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

[39] It must be remembered that the courts, especially the Superior Courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country for the following reasons:

(i) The amendment seeks to limit the jurisdiction and powers of the High Courts and inferior courts to whatever "may be conferred by or under federal law". The words "federal law" are defined in art. 160(2) as follows:

> Federal law means:
>
> (a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and
>
> (b) any Act of Parliament;

(ii) The courts cannot obviously be confined to "federal law". Their role is to be servants of the law as a whole. Law as a whole in this country is defined in art. 160(2) to include "written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof". Further, "written law" is defined in art. 160(2) to include "this Constitution and the Constitution of any State". It is obvious, therefore, despite the amendment, the courts have to remain involved in the interpretation and enforcement of all laws that operate in this country, including the Federal Constitution, State Constitutions and any other source of law recognized by our legal system. The jurisdiction and powers of the courts cannot be confined to federal law.

(iii) Moreover, the Federal Constitution is superior to federal law. The amendment cannot be said to have taken away the powers of the courts to examine issues of constitutionality. In my view it is not legally possible in a country with a supreme Constitution and with provision for judicial review to prevent the courts from examining constitutional questions. Along with arts. 4(1), 162(6), 128(1) and 128(2), there is the judicial oath in the Sixth Schedule "to preserve, protect and defend (the) Constitution".

(iv) With respect I do not think the amendment should be read to destroy the courts' common law powers. In art. 160(2) the term "law" includes "common law". This means that, despite the amendment, the common law powers of the courts are intact. (See: *Ngan Tuck Seng v. Ngan Yin Groundnut Factory Sdn Bhd* [1999] 3 CLJ 26). The inherent powers are a separate and distinct source of jurisdiction. They are independent of any enabling statute passed by the legislature. On Malaysia Day when the High Courts came into existence by virtue of art. 121, "they came invested with a reserve fund of powers necessary to fulfill their function as Superior Courts of Malaysia". Similar sentiments were expressed in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147.

(v) The amendment in my view cannot prevent the courts from interpreting the law creatively. It is now universally recognized that the role of a judge is not simply to discover what is already existing. The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond formal rules to seek a solution to the problem at hand. In a novel situation a judge has to reach out where the light of 'judicial precedent fades and flicker and extract from there some raw materials with which to fashion a signpost to guide the law'. When rules run out, as they often do, a judge has to rely on principles, doctrines and standards to assist in the decision. When the declared law leads to unjust result or raises issues of public policy or public interest, judges would try to find ways of adding moral colours or public policy so as to complete the picture and do what is just in the circumstances.

(vi) Statutes enacted in one age have to be applied in a time frame of problems of another age. A present time-frame interpretation to a past time framed statute invariably involves a judge having to consider the circumstances of the past to the present. He has to cause the statute to 'leapfrog' decades or centuries in order to apply it to the necessities of the times.

(vii) Further, in interpreting constitutional provisions, a judge cannot afford to be too literal. He is justified in giving effect to what is implicit in the basic law and to crystallize what is inherent. His task is creative and not passive. This is

necessary to enable the constitutional provisions to be the guardian of people's rights and the source of their freedom. (See: *Dewan Undangan Negeri Kelantan & Anor. v. Nordin bin Salleh & Anor* [1992] 1 MLJ 697; *Mamat bin Daud & Ors v Government of Malaysia & Anor* [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197).

(viii) Though there is much truth in the traditionalist assertion that the primary function of the courts is to faithfully interpret and apply laws framed by the elected legislatures, there are, nevertheless, a host of circumstances in which the role of a judge is not just to deliver what is already there. The role is constitutive and creative and goes far beyond a mechanical interpretation of pre-existing law. It extends to direct or indirect law making in the following ways:

1. Formulating original precedents

Life is larger than the law and there is no dearth of novel situations for which there is no enacted rule on point. In such situations a judge relies on the customs and traditions of the land and on standards, doctrines and principles of justice that are embedded in the life of the community to lay down an "original precedent" to assist the court. Admittedly, this fashioning of a new precedent is an infrequent occurrence but its impact on legal growth is considerable;

2. Overruling earlier precedents

Judicial creativity is fully in play when a previous precedent is overruled and thereby denied the authority of law. The overruling may be retrospective or prospective. In either case a new principle is contributed to the legal system and a new direction is forged;

3. Constitutional review

Under arts. 4(1) and 128 of the Federal Constitution, the Superior Courts of this country have the power to review the validity of legislative and executive actions by reference to norms of the basic law. If a legislative measure is found by the court to be unconstitutional, the court has a number of choices. It may condemn the entire statute as

illegal or it may apply the doctrine of severability and invalidate only the sections that are unconstitutional and leave the rest of the statute intact. The court may declare the statute null and *void ab-initio* or only from the date of the ruling. For instance in *Dato' Yap Peng v. PP* [1987] 2 MLJ 31 the Supreme Court invalidated s. 418A of the Criminal Procedure Code prospectively.

Questions of constitutionality are fraught with political and policy considerations and decisions thereon can influence the course of legal and political development. For example in *Faridah Begum v. Sultan Ahmad Shah* [1996] 2 CLJ 159 the majority held that the 1993 constitutional amendment removing the immunities of the Sultans cannot apply to suits brought by foreigners.

Article 162(6) of the Federal Constitution allows judges to modify pre-Merdeka laws in order to make such laws conform to the Constitution. Modification is without doubt a legislative task.

4. Statutory interpretation

In interpreting pre-existing law a judge is not performing a mere robotic function. The interpretive task is, by its very nature, so creative that it is indistinguishable from law-making. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." (per the American jurist Oliver Wendell Holmes). This is specially so in constitutional law. Even if it is accepted that a judge is bound by the intention of the legislature, it must be noted that such an intention is not always clearly defined. The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond the statute to seek a solution to the problem at hand. (See: *Chiu Wing Wa & Ors v. Ong Beng Cheng* [1994] 1 CLJ 313). A judge may scrutinise preambles, headings and extraneous materials like explanatory statements that accompany Bills and parliamentary debates to help unravel the meaning of statutory formulae. A judge may lean on the interpretation clauses of a statute or on the Interpretation Act 1948/1967 to decipher the intention of the legislature. Or he may fall back on a wealth of rules of

statutory construction to aid his task. So numerous and varied are these rules that judicial discretion to rely on one rule or another cannot be predicted. Sometimes a judge's attention is drawn to foreign legislation and related precedents. He may declare the overseas statute to be in *pari materia* with local legislation and, therefore, relevant to the case. Alternatively, he may pronounce the local law to be *sui generis* and therefore to be viewed in the local context without aid of foreign decisions.

When the enacted law leads to undesirable or unjust results, a judge may be persuaded to add moral or public policy shades to the issue in order to do justice.

One could also note, for instance, the "public interest" interpretation of art. 5(3) of the Federal Constitution in *Ooi Ah Phua v. Officer-In-Charge Criminal Investigation, Kedah/Perlis* [1975] 1 LNS 117 in which the court held that the constitutional right to legal representation can be postponed pending police investigation. In *Teoh Eng Huat v. Kadhi Pasir Mas* [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277 the "wider interest of the nation" prevailed over a minor's right to religion guaranteed by art. 11. In *Hajjah Halimatussaadiah v. Public Services Commission* [1992] 1 CLJ 413; [1992] 2 CLJ (Rep) 467 the court subjected a public servant's claim of a religious right to wear purdah at the workplace to the need to maintain "discipline in the service".

A judge is not required to view a statute in isolation. He is free to view the entire spectrum of the law in its entirety; to read one statute in the light of related statutes and relevant precedents; to understand law in the background of a wealth of presumptions, principles, doctrines and standards that operate in a democratic society. (See: *Kesultanan Pahang v. Sathask Realty Sdn. Bhd.* [1998] 2 CLJ 559). He is justified in giving effect to what is implicit in the legal system and to crystallize what is inherent. Such a holistic approach to legal practice is justified because "law" in art. 160(2) is defined broadly to include written law, common law and custom and usage having the force of law.

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5. Operation of doctrine of binding precedent

The doctrine of binding judicial precedent exists to promote the principle of justice that like cases should be decided alike. It also seeks to ensure certainty, stability and predictability in the judicial process. There can be no denying that the existence of this doctrine imposes some rigidity in the law and limits judicial choices. But one must not ignore the fact that some flexibility and maneuverability still exist.

Though a superior court is generally reluctant to disregard its own precedents, it does have the power "to refuse to follow" its earlier decisions or to cite them with disapproval. Our Federal Court has, on some occasions, overruled itself. High Court judges occasionally refuse to follow other High Court decisions. An inferior court can maneuver around a binding decision through a host of indirect techniques.

6. Application of doctrine of *ultra vires*

Whether an agency has acted *ultra vires* is a complex question of law that permits judicial creativity.

Some statutes declare that discretion is absolute or that a decision is final and conclusive. Some statutory powers are conferred in broad and subjective terms. To statutory formulae of this sort, contrasting judicial responses are possible. The court may interpret them literally and give judicial sanction to absolute powers.

Alternatively the court may read into the enabling law implied limits and constitutional presumptions of a rule of law society. This will restrict the scope of otherwise unlimited powers. (See: *R v. Lord Chancellor, Ex p Witham* [1998] QB 575). Subjective powers may be viewed objectively. Purposive interpretation may be preferred over literal interpretation. (See: *Public Prosecutor v. Sihabduin bin Haji Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82).

When procedural violations are alleged, a decisive but discretionary issue is whether the procedure was mandatory or directory. Violation of a mandatory procedure results in nullity. Violation of a directory requirement is curable.

7. Import of rules of natural justice

> Rules of natural justice are non-statutory standards of procedural fairness. They are not nicely cut up and dried and vary from situation to situation. Judges have wide discretion in determining when they apply and to what extent.

[40] Hence, it is reasonable to emphasize that the amendment should not be construed or viewed as having emasculated the courts in this country to mere automaton and servile agents of a federal Act of Parliament.

[41] Anyway, reverting to this appeal, for the reason I have given earlier on I would therefore allow it and restore the order made by the High Court.